here, members of the Committee requested extensive litigation materials from the Justice Department. Unlike the present case, the Chairman, although he disagreed with those Senators on the merits of the nomination, agreed that they were entitled to make their requests, and certified the requests as Committee requests to which the Department would have to respond. The Department in fact provided the Judiciary Committee with extremely sensitive deliberative litigation documents from various offices at Justice. They revealed the Department's strategies and thought processes on the appeal and settlement of a major set of antitrust cases.

Moreover, the Solicitor General himself, the eminent former Dean of Harvard Law School, Erwin Griswold, appeared before the committee and answered questions of Senators on both sides of the aisle on the content of the recommendations made to him by attorneys in the Department and by him to the Acting Attorney General and Antitrust division, including his own and others' opinions on the strengths and weaknesses of various litigating positions. Like every Solicitor General, he asserted the right of the Department to withhold deliberative documents. But at the same time he and the Department in fact disclosed and discussed those deliberations in the Senate, sometimes in unrestricted form and sometimes under restrictions.

Why did they do so? In the Department's own words, they could release any such information whenever they determined that there was a ''compelling public interest'' in doing so. And for some reason they concluded that there was such a public interest in getting Mr. Kleindienst—already confirmed as the Deputy Attorney General—confirmed to fill the vacancy in the position of Attorney General for the one year left in Richard Nixon's first term. I note that Justice did refuse to provide certain materials which the nominee offered to avow under oath would have no relevance to the facts at issue. After extensive additional hearings, the nominee was confirmed, but later resigned when documents eventually released in the Watergate and other proceedings showed that he had not been truthful in his testimony to the committee. He pleaded guilty to a subsequent criminal charge of ''failing to testify fully and accurately'' to the Senate.

That case demonstrates that the Department could and did as a matter of discretion release extremely sensitive litigation documents and information from the Solicitor General's office, including the testimony of the Solicitor General himself, merely to accomplish the confirmation of a cabinet member for a short-term appointment to a post which did not really need to be filled. Clearly then the Department has full power to release sensitive documents when they are requested in the context of a nomination for a lifetime appointment to the nation's ''second highest court.''

In this case a substantial portion of the committee have concluded that the White House has not met its burden of going forward. The nominee's record does not contain the usual body of judicial decisions or legal publications which demonstrate the way he addresses important legal questions. On the contrary, as the hearing record demonstrates, members had serious questions about the nominee's suitability, questions for which the nominee's answers ranged from evasive to inconsistent. But the committee did not have the full record. It did not have what may be the best evidence of the nominee's approach to current legal issues of great import, the writings of the nominee himself, writings composed by the nominee in the Solicitor General's office in circumstances which even his supporters concede were likely to show him at his most candid.

It is perfectly reasonable and logical for Senators to conclude that the Executive's refusal to provide that complete record is based on either or both of two rationales: Either the White House fears that Senate access to the documents—even without automatic public access—would confirm the unsuitability of the nominee, or the White House does not think there is a ''compelling public interest'' in completing Mr. Estrada's nomination process.

In either event, the ball is in the executive branch's court: If they think there is a compelling public interest in moving ahead with this nomination, they can and should turn over the materials. If they do not think there is a compelling public interest in proceeding with this nomination, they can continue to refuse to provide the materials. But if that is their decision, then they should cease their imposition on our time and especially our Republican colleagues' patience, forgo the Rovian hopes of short-term political gain from ''Groundhog Day'' repetitions of useless cloture votes, and just pull the nomination.

Mr. President, this nominee has been sent to the Senate of the United States. We had a very good debate the other day about the shared responsibility between the President and the Senate in naming individuals to the courts with lifetime appointments.

The PRESIDING OFFICER. The Senator has used 5 minutes.

Mr. KENNEDY. Mr. President, could I have 1 minute more?

I yield myself 1 more minute.

We had a very good debate on that issue. The fact is, this administration has seen all of those papers. On that basis, they have nominated him. But they have refused to let us see them and expect us to be a rubberstamp. It is wrong. I hope we will continue to reserve our judgment on this nominee until we get that information.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

The Senator from North Dakota.

Mr. CONRAD. Mr. President, it is my understanding we have a vote at noon; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. CONRAD. Mr. President, the floor leader, the chairman of our committee, is not in the Chamber at the moment, so I will not propound a unanimous consent request. But I would ask for his staff to consider that we permit another amendment.

I see the Senator is in the Chamber now.

I say to the chairman, I was just saying that we have this vote. Then it would be my hope that, at some point soon thereafter, we could have a vote on my amendment. I am told we need a window until 3 o'clock for votes. Maybe we could have an opportunity to offer additional amendments in that interim period and stack votes at 3 o'clock, if we are limited in our ability to vote until then.

Mr. NICKLES. Mr. President, I will be happy to work with my colleague. Because I have been running back and forth to a lot of meetings, I have not had a chance yet to even address the Senator's amendment that is pending, so I wish to do that.

Are we still working through the lunch break?

Mr. CONRAD. Yes. The intention was to do that. We would have the vote at noon. If the vote is done at around 12:30, that is why I am raising the question now of being able to offer another amendment, so we could use that time productively.

EXECUTIVE SESSION

NOMINATION OF MIGUEL A. ESTRADA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT COURT

The PRESIDING OFFICER. The hour of noon having arrived, the Senate will go into executive session and resume consideration of Executive Calendar No. 21.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, as you all know, we are going to vote on the Estrada nomination one more time with regard to cloture. The fact of the matter is, I am very concerned about this because I think the Senate is placing itself into a serious procedural set of problems that literally could come back to haunt the Senate for many years to come. You see, this is the first filibuster in history of a circuit court of appeals nomination.

It is a shame that there has to be a filibuster against one of the leading Hispanic legal thinkers in America—especially since I don't believe there has been a glove laid on Miguel Estrada from the beginning of this debate right up until today.

Everybody knows this man is highly qualified, having received the highest rating from the American Bar Association of unanimously well-qualified. Very few judgeship nominees receive that type of unanimously well-qualified rating from the American Bar Association.

Miguel Estrada has lived an American dream life. He came here from Honduras at age 17. He hardly understood English, and taught himself English. He graduated from high school and went on to Columbia University where he graduated magna cum laude. He then went on to Harvard Law School and graduated magna cum laude. He was editor of the Law Review at Harvard. Miguel Estrada became a law clerk to Judge Amalya Kearse on the Second Circuit Court of Appeals, one of the most coveted spots for young law graduates who are of exceptional ability, and then he became a law clerk for Justice Anthony Kennedy on the U.S. Supreme Court. Certainly, one of the most coveted jobs any young law graduate can have is to clerk for a Justice on the U.S. Supreme Court.

Miguel Estrada became a prosecutor in the Manhattan office and tried appeals there for the prosecutor's office. He went on to become a member of the Solicitor General's Office as Assistant Solicitor General. He worked there for 5 years—4 years for the Clinton administration, 1 year for the Bush administration—where, according to performance reviews, he was given the highest ratings one could possibly receive from his superiors and where he argued cases before the Supreme Court. This man has argued 15 cases before the U.S. Supreme Court, winning 10 of them. Most attorneys never have an opportunity to argue before the Supreme Court, let alone have the experience Miguel Estrada had.

He went through one of the most detailed hearings on record before the Senate Judiciary Committee last September, conducted by the distinguished Senator from New York, Mr. SCHUMER. My friends on the other side have said this hearing was conducted fairly; it was a decent hearing. They had every opportunity to ask any questions they wanted. If they wanted to go longer, they could have gone longer. They did not. Afterwards everyone had the opportunity to file written questions. Only two Democrats filed written questions: Senator KENNEDY of Massachusetts and Senator DURBIN of Illinois.

Now we find ourselves, because the Republicans have taken control of the Senate, with a nominee before the Senate who probably would never have gotten here had it been left up to my colleagues on the other side and whose nomination now hangs in the balance because of a first-time filibuster in history against a circuit court of appeals nominee. In fact, we have only had one successful filibuster in the history of this country against a judicial nominee, and that was Abe Fortas back in 1968 when it was a bipartisan filibuster; both Republicans and Democrats filibustered Fortas. I did not agree with that filibuster then. I do not think it was right then, and I certainly do not agree with the filibuster now. I think it is very dangerous.

More importantly, if we continue to filibuster this nominee, it will show once and for all that the Senate is broken with regard to Executive Calendar nominees and, in particular, judicial nominees. If we are going to filibuster nominees we do not care for on either side of this august room, if the Democrats received a Democrat President and we filibuster his nominee because our nominee has been filibustered, then I think this system will be totally broken, will break down, and be very hard to repair.

I hope my colleagues on the other side will think through what they are doing. I hope there are a number of clear-thinking people on the other side who will realize that this is a dangerous procedure to do. It flies in the face of the Constitution because the President has the nomination power, and he has the appointment power, and we have the advise and consent power. But advise and consent means an up-or-down vote. It means once a person comes to the floor, there comes a time when debate has to end and there should be an up-or-down vote. In this case, that vote has been prohibited by our colleagues on the other side through this mechanism of a filibuster for the first time in history.

I believe what they are doing is blatantly unconstitutional because by requiring 60 votes to have an Executive Calendar nominee pass through the Senate, we are diminishing the executive branch of Government and the judicial branch of Government vis-a-vis the legislative branch of Government. All three are supposed to be coequal branches of Government.

This practice is dangerous. In my view, it is unconstitutional. We have to face this one way or the other, and all because my colleagues on the other side claim they do not know enough about Miguel Estrada, after all of these experiences, all of this knowledge we have about him, after one of the longest hearings on record in the history of circuit court of appeals nominations. In addition they are hiding behind a red herring, a false demand to go on a fishing expedition through all of the appeals certiorari and amicus curiae recommendations that Miguel Estrada worked on while at the Solicitor General's Office for 5 years. That has never been allowed before, it should never be allowed, and, frankly, I do not believe any self-respecting administration will ever allow that type of a fishing expedition into the most confidential, privileged papers in the Justice Department itself.

Seven former living Solicitors General, four of whom are Democrats, three of whom worked with Miguel Estrada as Democrat Solicitors General in the Clinton administration, have said it is highly inadvisable to allow this type of a demand by the Democrats to be approved by anybody because it would certainly damage the information on which so many of our Solicitors General have come to rely.

Yet this day people are saying they just do not know enough about this man. There has hardly been a nominee to any circuit court of appeals in this country in history who is more well known than Miguel Estrada.

The problem really comes down to this: He is conservative, and I think my colleagues on the other side believe he is pro-life. I personally do not know what he is with regard to the abortion issue, but I can tell you this, Mr. President: I do believe he is basically a good, strong conservative but a conservative who worked in the Clinton Justice Department for 4 solid years with the highest recommendations of his supervisors while he was at the Clinton Justice Department in the Solicitor General's Office. So this phony red herring issue is exactly that.

If we continue to filibuster this man, I believe we will have a Senate that is broken, a system that is broken, and we are going to have to do whatever we have to do to see that Executive Calendar nominees get up-or-down votes when they come before the Senate. Presidents of the United States deserve that consideration and they should have it.

If one reads the advise and consent clause in article II of the Constitution, just a few lines above it, it was made clear that you can have supermajority votes, and I think there are seven mentioned in the Constitution. But just a few lines above the advise and consent clause is a requisite two-thirds vote for ratification of treaties. If the Founding Fathers wanted to allow or require supermajority votes with regard to the advise and consent clause, they would have said so. They did not. The natural conclusion from any constitutional scholar would be that we are entitled to an up-or-down vote as the exemplification of the advise and consent clause.

The fact is, that is not being allowed because of a filibuster on the other side with the phoniest of excuses that they do not know enough about this very well-known young Hispanic man of high quality, high ability, with the highest recommendation possible, not only from the American Bar Association but from Democrat attorneys as well, such as Seth Waxman, for whom I have great affection and respect, a former Solicitor General of the United States.

I hope our colleagues will think it through and we vote for cloture so we can have an up-or-down vote on Mr. Estrada, and if they do not, we will have to see what happens in the future.

With this third cloture vote, we will have reached the most cloture votes ever given or ever required in the history of the Senate for an executive calendar nominee. Should cloture not be invoked, we will still go to further cloture votes, as we should. We need to

fight for this nominee because he deserves the right to sit on the Circuit Court of Appeals for the District of Columbia.

I yield the floor.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, with respect to this issue of Mr. Estrada, if those who come to the floor to make speeches about Mr. Estrada are trying to put together a puzzle for us, they are missing about six or eight key pieces. Let me use some information and some time to describe what those pieces are.

I do not want anyone to tell me that we have folks in this Chamber who do not support the President and the process by which we nominate and confirm judges. I think we have voted on 111 Federal judges in the Senate and I believe I voted for 110 of them. Now, I am a little weary of people coming to the floor and misstating the facts. They say, this is the first filibuster we have ever had. Not true. That is just not the case. Mr. Paez waited 4 years in the Senate, under the leadership of those who are now concerned about moving Mr. Estrada through this Chamber, and in order to get Mr. Paez through this Chamber there had to be a cloture vote. So I am a little weary of these stories about cloture.

We had a cloture vote on Mr. Paez. Why? Because that was required in order to move his nomination, which waited 4 years.

Mr. HATCH. Will the Senator yield on that?

Mr. DORGAN. I am happy to yield to the Senator on his time, if that is all right with the Senator.

Mr. HATCH. Yes. Is the Senator aware that there has never been a cloture vote to prevent somebody from having an up-or-down vote for the circuit court of appeals or the district court in this country, and further, no one has ever been stopped by a cloture vote in this country prior to this other than Abe Fortas?

Further, let me ask the Senator this additional question: If the Senator is referring to me as misstating the facts, I was the one who put Paez through. I was the one who put Berzon through. I was the one who put through a whole raft of them who were criticized on our side. I hope the Senator is not referring to me on this matter.

Does the Senator know of anyone, other than Abe Fortas, who was stopped by a filibuster who did not, once they got to the floor, have an up-or-down vote?

Mr. DORGAN. Mr. President, the Senator asks an interesting and a good question. He talks about people who got to the floor of the Senate. I could bring out a chart that shows candidate after candidate for the circuit court who never got a hearing in the committee, not one hearing on the committee, let alone a vote in the committee or a vote on the floor.

Mr. HATCH. Will the Senator yield on that?

Mr. DORGAN. Let me continue my statement. Let me say this with respect to cloture votes and a filibuster: Mr. Paez waited 4 years. The only way he got to the floor for a vote was with a cloture vote. That is called a filibuster, a cloture vote to break a filibuster.

Let me say this about Mr. Estrada: Having voted for every Federal judge but one who has been nominated by President Bush, I am prepared to have a vote on Mr. Estrada as soon as Mr. Estrada and all of those who support him say to this administration and to this candidate for a lifetime appointment, answer the questions. I would say to the Senator from Utah—on the day he had Mr. Estrada's hearing, he also had a hearing for another candidate for a judgeship. His name is Judge Hovland. He is in the Western District of North Dakota, a Republican, someone I supported strongly. I came that day and spoke for him. I say to the Senator from Utah, on the same day Mr. Hovland appeared before the committee, Mr. Estrada appeared before the committee. Does the Senator know that Mr. Hovland answered the very questions Mr. Estrada would not? Does the Senator know that Mr. Estrada refused to answer the questions Mr. Hovland answered?

Mr. HATCH. Will the Senator yield?

Mr. DORGAN. I ask the question of the Senator: Why is that the case? And I would simply say this: As soon as Mr. Estrada answers the questions and provides the information, I believe there ought to be 100 votes for cloture and we ought to have an up-or-down vote on Mr. Estrada. Until that time, no one who aspires to a lifetime on the Federal bench ought to be able to say to this Senate we are going to withhold information that has been requested.

I do not think the Senator from Utah should want that. I do not want it, and at least speaking as one Senator, I will not allow it. I will not vote for cloture until Mr. Estrada provides the information that has been requested of him.

I am happy to yield on the time of the Senator.

Mr. HATCH. I think the Senator has a splendid record with regard to voting for Federal judges, and I personally appreciate that.

Is the Senator aware that no true filibuster has ever succeeded against any Federal court nominee, other than Abe Fortas, in the history—

Mr. DORGAN. Well, I say—

Mr. HATCH. Let me ask my full question—of this country?

Secondly, is the Senator aware that Mr. Estrada, and the White House, have not only offered to come up and speak personally and answer every question of any Senator, they have offered to answer any questions in writing. He has answered all of those questions in writing for this body. And is the Senator aware that we have also offered to even have another day of hearing, as long as we get an up-or-down vote, where any Senator who wants to can ask any question he wants to on the committee?

I would even go broader than that. I invite any Senator on the Democrat side who wants to ask any question to come to the committee and ask him. But we would want a vote certain in order to do that. No candidate nominated in the history of this country has ever made that offer, and I am just saying I think he has answered the questions and I think the Senator just is not aware of it.

Mr. DORGAN. I am happy to yield to the Senator on his time. The Senator from Utah has had a generous amount of time on the floor of the Senate to make his case on many occasions, and he makes his case in a very persuasive way for those on his side of the aisle, perhaps. But having voted for all but one of the nominees sent by this President, I am a little weary of hearing anybody stand up and say those of us who vote against cloture are somehow obstructing at this point because the Senator knows full well why cloture has not been achieved. The answer is very simple. We have asked for only two things of this nominee: One, answer the questions that were put to him in that hearing.

Mr. HATCH. Which he has done.

Mr. DORGAN. Well, that is not the case. That has not been done. But No. 2, release the information that is available with respect to his service at the Justice Department for the Solicitor General's Office.

The fact is, when those conditions are met, I will be on the floor saying, let us have a final vote on Mr. Estrada. If those conditions are not met, neither the Senator nor anyone else in the Senate ought to demand that we give up our rights and opportunities to ask questions for those who seek a lifetime appointment to the Federal bench.

Mr. HATCH. Will the Senator yield one more time?

Mr. DORGAN. I say this, I am a little weary of the campaign that is going on around the country, letters to the editor, and talk shows, and all the rest that forget about two, three, or four key pieces to the puzzle, and the key pieces to the puzzle are this: This President has a right to nominate candidates to Federal judgeships. He has done two in North Dakota, both Republicans, both wonderful people. I supported them strongly. They are both now on the Federal bench. Our country is better because of it. I have voted for other Federal judges whose philosophy I disagree with because I think by and large they were qualified to serve on the Federal bench, and I have voted for all but one of those nominees sent by President Bush.

Let me come back to this point. On the very day the Senator from Utah presided over a hearing in the Judiciary Committee, Judge Hovland from North Dakota answered questions that Mr. Estrada did not answer. I do not understand why a committee chairman is not the first one on the floor of the

Senate to say we ought not move this until we get all the information we requested.

I am not someone who will stand in the way of a final vote on Mr. Estrada because of philosophical or other concerns. I will not do that. But as long as I am in the Senate with Republican or Democratic candidates for the Federal bench, I will demand they answer the questions put to them. In this case, Mr. Estrada has not done that.

One last time I will yield on your time.

Mr. HATCH. He has answered the questions in writing as well as orally in a very lengthy hearing. Is the Senator aware at any time in history—I am sure he is not—where a fishing expedition has been allowed into the Solicitor General's confidential privileged memoranda, on all appeals, certiorari, and amicus curiae recommendations? That has never happened in the history of this country.

I have offered to the side of the distinguished Senator to make available, if there are specific questions, I would go to the White House and see what I can do. But never has there ever been allowed a fishing expedition into all of these very privileged documents without some reason for authorizing it, and there is no reason offered by my colleagues on your side.

Mr. DORGAN. Reclaiming my time, a fishing expedition is not at all what this is about. The Senator from Utah knows that. I have listened to him at great length and voted with him on almost all judgeships. The Senator from Utah ought to demand what I demand and others demand: Candidates who aspire to a lifetime appointment to the bench ought to respond to the request for information from this Congress. That has not happened in the case. You can assert it until you are blue in the face. It is not the case that the information has been made available. Other candidates made it available. Mr. Estrada has not. When he does, I believe he ought to get his vote. Until he does, he should not get that vote.

I am weary that those who support this President's nominees almost universally are told we are somehow obstructing. That is not the case. Especially in circumstances where there were a good many fine people in this country who were nominated for the Federal judgeships, including circuit courts, who never got a hearing before the committee, I didn't hear anyone on the floor of the Senate, especially from that side, talking about it at great length. These are good men and women. They never got a hearing. This is not payback as far as I am concerned.

Mr. Estrada should get his vote as soon as he complies with the request for information from the Senate, which he has not done. He can do it this afternoon, and we can have a vote tomorrow, as far as I am concerned.

Mr. FRIST. Mr. President, the Senator from Massachusetts earlier made comments as to the Solicitor General memoranda requested for Miguel Estrada that are not well informed and have been refuted by a letter from the Department of Justice, sent to me, dated today, March 18, 2003. I ask unanimous consent that this letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, March 18, 2003.

Hon. BILL FRIST,
Majority Leader, U.S. Senate, Washington, DC.

DEAR MR. LEADER: I write to correct a significant and recurring misstatement of fact regarding the nomination of Miguel Estrada, which has been repeated several times on the Senate floor in the past several weeks. As noted below, several Democrat Senators have asserted or implied their belief that the White House and the Department of Justice reviewed Mr. Estrada's appeal, certiorari and amicus recommendations authored during his tenure in the Bush and Clinton Solicitor General's Offices before deciding whether to nominate him to the D.C. Circuit, and that the decision not to disclose these memoranda is based on the Administration's knowledge of their contents. Nothing could be further from the truth. Despite the fact that counsel to the President Alberto Gonzales explained in a February 24th letter to Senator Schumer that ''[n]o one in the Executive Branch has reviewed these memoranda since President Bush took office in January 2001,'' Senators continue to repeat this allegation, which warrants this additional response. An identical letter will be sent to Minority Leader Daschle.

Because the professional opinions of attorneys in the Solicitor General's office are—and always have been—confidential, no one in the White House, the Department of Justice or anywhere else in the Executive Branch reviewed these privileged documents—not before Mr. Estrada's nomination on May 9, 2001, and not since then. Unfortunately, the mistaken notion that the Administration has reviewed Mr. Estrada's memoranda has grown rapidly from speculation to rumor to purported fact. In order that your colleagues might have the most accurate information available during your deliberations on Mr. Estrada's nomination, we wish to point out specific misstatements and erroneous assumptions on this issue and to set the record straight.

In a February 12, 2003, floor speech, Senator Leahy speculated that the Administration knows what is in Mr. Estrada's confidential memoranda: ''Regarding the document request related to Mr. Estrada's nomination, he has told both Senator Hatch and myself, as well as several Members of the Senate, that he is perfectly willing to show us his writings and respond to them and answer questions about them, but he has been told by the administration that he cannot; the administration, however, would review those writings. They are the only ones who know whether this direct evidence of his views, the interpretation of law, is accurate or misleading—they are the only ones who have access to it and they say, basically: Trust us.'' Congressional Record, Feb. 12, 2003, at S2251. Senator Durbin elevated the speculation to a conclusion on February 26: ''Mr. Gonzales in the White House said, no, we will not consider producing anything. It leads members to conclude on this side of the aisle that there is something very damaging in these materials that they do not want disclosed. It is the only conclusion you can draw . . . this White House, tentative and concerned about whether or not Miguel Estrada has said some things that could jeopardize his nomination, refuses to disclose.'' Congressional Record, Feb. 26, 2003, at S2756.

Several days later, Senator Schumer repeated the mistaken assumption that the Administration has reviewed Mr. Estrada's memoranda: ''Why won't Mr. Estrada or the administration—which is his sponsor, his mentor—in this particular situation why won't he give up these documents? I will tell you what most people think when they hear about it. And I have talked to my constituents, the few who ask me about this. They say he is hiding something. Do I know he is hiding something. Do I know he is hiding something? Absolutely not. I have not seen the documents. But I tell you one thing: The great lengths that the administration and my colleagues on the other side have gone to not give up these documents makes one suspect there is something there they do not want people to see. So the documents are crucial.'' Congressional Record, Mar. 4, 2003, at S3064.

Senator Kennedy extended the error when he suggested that the Administration reviewed Mr. Estrada's memoranda in the selection and vetting process prior to nomination: ''We certainly have the obligation to do so when the Executive Branch prevents us from exercising our assigned constitutional powers of advice and consent by depriving us of any access to the only documents which might tell us what kind of a judge a nominee will be—the very documents which the President's lawyers used to select and vet the nominee.'' Congressional Record, Mar. 11, 2003, at S 3434.

In a March 13, 2003, floor speech, Senator Leahy completes the cycle of misstatements when he asserted that the Administration reviewed Mr. Estrada's memoranda in deciding whether to nominate Mr. Estrada.

''The real double standard in the matter of the Estrada nomination is that the President selected Mr. Estrada in large part based upon his 4½ years of work in the Solicitor General's Office, as well as for his ideological views. The administration undoubtedly knows what those views are and have seen those work papers. They know what he did. They picked him based on that, but they said even though we picked him based on that, we do not want the Senate to now what it was. We in the Senate cannot read his work, the work papers that would shed the most light on why this 41-year old should have a lifetime seat on the Nation's second highest court.

''We are to a point where the White House simply says, trust us, we know what he wrote and how he thinks and will make decisions, but we do not want you to know what he wrote, just rubberstamp him.

''. . . There seems to be a perversion to require the Senate to stumble in the dark about Mr. Estrada's views when he shared these views quite freely with others, and when the administration selected him for his high office based on these views.'' Congressional Record, Mar. 13, 2003, at S3671.

These assertions are simply wrong. First, each statement is based on the fundamentally erroneous premise that officials in this Administration have seen Mr. Estrada's memoranda. Let me assure you unequivocally—and permanently put to rest any misunderstanding—that at no time has this Department of Justice or the White House ever reviewed the memoranda that Miguel Estrada wrote during his tenure in the Solicitor General's office.

Second, the statements above mistakenly suggest that the Department of Justice has declined to release Mr. Estrada's memoranda

because of concerns over their content. In reality, as we have explained, the Department has chosen to keep these documents confidential for the reason articulated by all seven living former Solicitors General—including four Democrats: ''Any attempt to intrude into the Office's highly priveliged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests.''

Thank you for allowing me to set the record straight on this important point. I appreciate the opportunity to assure you and your colleagues that we in the Administration have never examined Miguel Estrada's confidential memoranda. I hope that by clearing up this misunderstanding, we will have taken an important step toward ending the filibuster of Mr. Estrada—the first filibuster of a lower-court nominee in American history—and allow the bipartisan majority of Senators who support Mr. Estrada to vote on his confirmation.

Sincerely,

JAMIE E. BROWN,
Acting Assistant Attorney General.

Mr. FRIST. Mr. President, today's third cloture vote on Miguel Estrada's confirmation breaks through a new barrier—not the barrier that some may have hoped for with this exceptional nominee.

It is unprecedented that a circuit court nominee be subjected to a third cloture vote. A no vote today remains unfair to this nominee who has been pending over 700 days, it is unfair to the bipartisan majority that wants to end this debate and have a vote, and it is unfair to the President, who deserves better from this Senate.

Eighteen times the majority has requested unanimous consent to vote on the Estrada confirmation. Eighteen requests have been denied, even though Senators have debated this confirmation for over 100 hours. Twice before today, a bipartisan majority has likewise requested to end debate by voting for cloture.

Others, too, have expressed their desire that we end this debate. Over 113 editorials in 31 States have called for an end to this filibuster and expressed their support for this nominee. Only 11 have expressed the opposite.

The filibuster to this nomination continues despite the unprecedented accommodations that have been offered:

Repeatedly, the White House has offered the nominee up to answer more written questions; only one Senator took them up on it.

Repeatedly, the White House has offered the nominee up to meet privately to answer more questions; only one Senator took them up on it.

I have offered the nominee up for a second hearing. The offer was rejected.

Now that the minority has stopped saying that Mr. Estrada is unresponsive they now focus on their unlimited request for confidential and privileged memoranda. They do this even though all living past Solicitors General, including four Democrats, have opined that this request is improper.

We will not give up. This nominee will be confirmed and we will keep on voting if necessary. The minority's position on this is unreasonable. I hope they will be as accommodating as we have been.

Mr. HATCH. Mr. President, it is disturbing to me that much of the debate regarding the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit has focused on previous nominations considered by this Senate. In particular, the nominations of Judge Richard Paez and Judge Marsh Berzon, who now sit on the Ninth Circuit Court of Appeals, have been raised over and over again by Senators opposed to Mr. Estrada.

The discussion of previous nominations is troubling for a number of reasons. First, Judge Paez and Judge Berzon were confirmed by the Senate. They were not subjected to a filibuster as is the case for Miguel Estrada. Second, on a personal level, it is disappointing to me that these two judges should be used as examples of alleged Republican obstructionism, when I worked hard for their confirmation, argued against delay, and supported their nominations.

To continue to inject prior nominations into the Estrada debate indicates to me that the opposition is more interested in some sort of retribution for misperceived wrongs rather than fulfilling the Senate's constitutional duty of advice and consent. I have heard it stated on the Senate floor, referencing the so-called filibuster of Judge Paez, ''what goes around comes around.'' I certainly hope that it is not the case that the refusal to give a vote to Miguel Estrada is some sort of payback.

The distinguished Minority Leader described the Senate's responsibility very well nearly three years ago as we were concluding debate on the nominations of Judge Paez and Judge Berzon. He stated on March 9, 2000, '' . . . [T]here is a time and a place for us to consider any nominee and, once having done so, we need to get on with it.''

I agree with the Democratic leader. We have considered the nomination of Mr. Estrada and now we need to get on with the vote—up or down, as Senators choose to cast their vote.

Senator DASCHLE continued, ''I do not know who is going to be President next. I do not know who is going to be in the majority in the next Congress. But let's just assume that the roles are reversed . . . and we have a Republican President—which I do not think is going to happen. Do we want to pay back our colleagues for having made these people wait as long as they have? . . . I do not want to hear about that in this body. There is going to be no payback. . . . Will we have votes and vote against nominees on the basis of whatever we choose? Absolutely.''

So again, as the Democratic leader stated, Senators are free to vote against the nominee on the basis of whatever they choose, but let us have a vote.

Now, as Chairman of the Judiciary Committee, I worked hard for the ultimate confirmation of Judge Paez and Judge Berzon. Nevertheless, there were some significant difficulties with their nominations which took time to resolve. I agree that they took too much time. However, these nominees did receive a vote, they were confirmed, and they now sit on the Ninth Circuit. These two nominees were not filibustered as Mr. Estrada is now being filibustered. It is true that cloture motions were filed on the nominations. Let me emphasize that it was the Republican Leader who filed a cloture petition, so there would be limited debate and a vote up or down. Furthermore, those cloture motions passed by wide margins, 86–13 in the case of Judge Berzon, and 85–14 in the case of Judge Paez. The record is clear that a true filibuster did not occur with regard to these nominations.

Following the cloture votes, the Majority Leader, Senator LOTT, made the following comments: ''As you know, cloture was just invoked on two Ninth Circuit judges. I still hope we have not set a precedent. I don't believe we have because it was such an overwhelming vote to invoke cloture and stop the filibuster. We should not be having filibusters on judicial nominations and having to move to cloture. But we had to, and it was an overwhelming vote.''

Senator LEAHY's response to the Majority Leader's statement is noteworthy. He said: ''I was struck by the comments of the distinguished leader in saying we should not have the precedents of filibusters and requiring cloture. I commend him for supporting the cloture motion and moving this forward so we would not have that precedent.''

As I have said, the confirmations of Judge Paez and Judge Berzon were not without delay. There was considerable opposition to their nominations. But that delay did not amount to anything sort of a filibuster of these nominees.

The debate on both Judge Paez and Judge Berszon took place on March 7, 8 and 9 under time agreements. The final day of debate, when they were confirmed, was 4½ hours total. The Republican leadership did file cloture to get time agreements and to ensure a final vote on these two nominees of President Clinton. I have asked for similar treatment for Miguel Estrada—a time agreement and an up or down vote but this has been denied repeatedly.

So the record is clear that this was not a true filibuster. There was limited debate with time agreements. Cloture was filed as a floor management tool and was overwhelmingly approved. The nominees did receive an up or down vote both were confirmed. Let's give Miguel Estrada that same courtesy.

Now with regard to the nominations of Judge Paez and Judge Berzon, I do not want to rehash the debate on these nominees, but I do want to put their confirmation into some perspective, since my Democratic colleagues keep bringing them up.

Judge Paez's opponents were very concerned about statements he made in

1995, while a sitting federal district judge, regarding two California ballot initiatives—Proposition 187 to limit public assistance to illegal immigrants, and Proposition 209 to end racial and gender preferences in California. Legitimate questions were raised concerning whether his comments were consistent with the Judicial Canon governing judges' extra-judicial activities. There was genuine concern about these remarks on matters that would likely be the subject of litigation. Many of my colleagues viewed this as evidence of his inability to render fair decisions on these issues.

A second area of concern regarding Judge Paez involved what some saw as his activist views of the judiciary. Judge Paez had stated, ''I appreciate the need for courts to act when they must when the issue has been generated as a result of the failure of the political process to resolve a certain political question. There is no choice but for the courts to resolve a question that perhaps ideally and preferably should be resolved through the legislative process.'' Now, this statement did raise concerns that Judge Paez would use his position to legislate from the bench.

A third issue regarding Judge Paez was his rulings in certain cases. In particular, there was legitimate concern over the judge's role in two cases related to illegal fundraising during the 1996 presidential campaign—those of John Huang and Maria Hsia. You may recall Ms. Hsia was associated with fundraising and money laundering through Buddhist nuns, while Mr. Huang was associated with illegal campaign fundraising, mostly from foreign sources. Judge Paez was assigned to both of these cases.

In the case of John Huang, Judge Paez accepted a very lenient plea agreement. Mr. Huang pled guilty to a felony charge of conspiracy to violate Federal election law and was sentenced to no jail time. He was ordered to pay a $10,000 fine and was required to serve 500 hours of community service.

Many of my colleagues found it suspicious that Judge Paez would be assigned to both of these cases. There was criticism about the handling of these cases. At a minimum, there was concern about the propriety of his involvement in these cases, which pointed back to the Clinton-Gore campaign.

Despite all the concerns regarding the involvement of Judge Paez in these cases, my own view was there was no reasonable basis to further delay the vote on Judge Paez. I was vigorous in my call for an independent prosecutor to investigate all alleged illegalities in the 1996 campaign. However, I also did not believe Judge Paez was implicated and I pressed forward with his nomination. I am asking the same treatment for Miguel Estrada—give him a vote.

There were also questions over Judge Paez's ruling on a Los Angeles city ordinance prohibiting aggressive panhandling at specified public places and passed in response to the death of a young man who refused to give a panhandler 25 cents. Judge Paez found the ordinance unconstitutional under the California constitution because the law constituted ''content-based discrimination.'' The Supreme Court of California, asked by the Ninth Circuit Court of Appeals to rule on the holding, held that the Los Angeles ordinance was constitutional and valid.

Another troubling case was a decision issued by Judge Paez in 1997, John Doe I v. Unocal, in which he ruled that American companies can be held liable for human rights abuses committed by foreign governments or overseas companies owned by the foreign governments with which they do business. These cases, and others, persuaded many of my colleagues that Judge Paez was well out of the mainstream.

With regard to Judge Berzon, I voted for her confirmation, finding her to have the intellect, integrity, and impartiality to serve as a Federal judge.

Those opposed to Judge Berzon pointed out that her entire legal experience was in one narrow field—labor law. Her opponents also pointed out that she had been very vocal in the expression of her political views, with membership and leadership in several organizations that many considered activist.

The fact remains that, regardless of the opposition and careful scrutiny of these nominees, both Judge Berzon and Judge Paez each were given an up or down vote. In the case of Judge Paez, he was confirmed by a vote of 59–39. Judge Berzon was confirmed by a vote of 64–34. Miguel Estrada deserves the same courtesy. If Senators are opposed, let them vote no. But to refuse a vote is unfair to the nominee, harmful to the Senate, and destructive to the notion of an independent judiciary.

Mr. LEAHY. Mr. President, this is not a day, in my view, when the Senate majority should be pressing forward on this divisive matter. Nor has anything changed since last Thursday or since March 6 when the Republican majority scheduled two earlier cloture votes on this nomination. The administration's obstinacy continues to impede progress to resolve this standoff. The administration remains intent on packing the federal circuit courts and on insisting that the Senate rubber stamp its nominees without fulfilling the Senate's constitutional advise and consent role in this most important process. The White House could have long ago helped solve the impasse on the Estrada nomination by honoring the Senate's role in the appointment process and providing the Senate with access to Mr. Estrada's legal work. Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this Administration did so with a nominee to the Environmental Protection Agency.

We have the statement of Attorney General Robert H. Jackson, who later became one of our finest Supreme Court Justices, when he wrote an Attorney General Opinion in 1941 acknowledging that among the occasions when exceptions should be made and executive Department files would be produced to the Congress would be confirmations. As Attorney General Jackson noted:

> Of course, where the public interest has seemed to justify it, information as to particular situations has been supplied to congressional committees by me and by former Attorneys General. For example, I have taken the position that committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information that we have—because no candidate's name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light.

Senator DURBIN noted last week that the administration has poorly served this nominee and given Mr. Estrada very bad advice. I agree.

The Bush administration claimed that no administration had ever provided materials like Mr. Estrada's work papers in connection with a nomination. We have now demonstrated over and over that precedents exist going back over the last 20 years.

Today, I would like to mention additional examples of similar materials that were provided to Congress. On February 1, 1982, the Senate Finance Committee held a hearing to consider legislation to deny Federal tax-exempt status to private schools practicing racial discrimination, after the Reagan administration decided to reverse a long-standing policy and grant exemptions to segregationist schools. A number of Justice Department memoranda, as well as communications between high-level officials, were turned over by the Reagan administration to the Senate Finance Committee in connection with the hearing, just months after the documents were first written.

The issues at that hearing reveal that some of the documents turned over were much more sensitive than those requested of Mr. Estrada, but they were still provided to Congress by the Reagan administration. After a long and intense debate in the Reagan Justice Department and among high-level Justice and Treasury Department officials and White House counsel, on January 8, 1982, the Reagan Justice Department announced that it would discontinue the IRS's long-standing policy of denying tax-exempt status to racially discriminatory private schools. The Justice Department also changed its position in the Bob Jones case before the Supreme Court, abandoning its defense of the policy that prohibited tax exemptions for discriminatory schools. One of President Bush's current circuit court nominees, Carolyn Kuhl, was an aide to Attorney General William French Smith at the time and participated in urging reversal of the policy.

After the Justice Department decision was announced, more than 200 lawyers and others in the Justice Department's civil rights division sent a letter to William Bradford Reynolds, who then headed the civil rights division, expressing ''serious concerns'' about the Reagan administration's decision that racially discriminatory private schools are entitled to tax exemptions. And they questioned the division's commitment to vigorously enforce the Nation's civil rights laws.

In response to such protests, President Reagan proposed legislation to make it illegal to grant tax exemptions to schools that discriminate on racial grounds. The Senate Committee on Finance, and the House Committee on Ways and Means, scheduled public hearings on the Federal Government's policy regarding the effect of racial discrimination on the tax-exempt status of private schools.

The Senate Finance Committee held its hearing on February 1, 1982. In connection with this hearing, the committee requested high-level Justice Department memoranda, correspondence, deliberations, and other documents related to the reversal of the administration's position. The documents turned over to the Senate Finance Committee included:

Letters from Representative TRENT LOTT to Secretary Regan, IRS Commissioner Egger, and Solicitor General Lee, urging change in the administration's position on Bob Jones;

memorandum from Associate Deputy Attorney General Bruce Fein to Deputy Attorney General Edward Schmults, advising Schmults on private schools;

memorandum from Carolyn Kuhl, Special Assistant to the Attorney General, to Ken Starr, noting Reagan/Bush campaign statements on private schools;

memorandum from Peter Wallison, Treasury General Counsel, to Secretary Regan briefing him on meeting with Representative LOTT;

memorandum from Treasury General Counsel Wallison to Deputy Secretary McNamar and Secretary Regan on Government's position in Bob Jones case;

memorandum from Civil Rights Division Head, William Bradford Reynolds, to Attorney General Smith justifying changes in Administration's position on Bob Jones;

memorandum from Treasury Assistant Secretary for Public Affairs, Ann McLaughlin, to Deputy Secretary McNamar on ''press strategy'' for releasing Bob Jones decision;

memorandum from IRS Chief Counsel Gideon to Treasury Deputy General Counsel Government's statement in Bob Jones;

letter from IRS Chief Counsel Gideon to Civil Rights Division Head Reynolds on formulation of Government's statement in Bob Jones; and

memorandum from Assistant Attorney General Theodore Olson from the Office of Legal Counsel to Attorney General Smith and Deputy Attorney General Schmults responding to the analysis in Reynolds' memo on Bob Jones.

Clearly, in 1982, the Republican administration at that time released to the Senate documents that included internal memoranda among high-level Justice Department officials, interagency communications, and documents relating to the government's position in an important Supreme Court case. They also included letters to the Solicitor General.

Moreover, the Reagan administration turned over these documents within months after being written, and no harm was done to the workings of the Justice Department or the administration. The Bush administration is claiming that it is unprecedented to turn over such documents—and that the release of documents written by Mr. Estrada 6 to 10 years earlier would irreparably harm the government. I urge the administration and Republican Senators to consider this additional precedent. Certainly legislation is different from a nomination. While both are matters for the Senate, legislation is different in that it can be amended or revised. A nomination is a lifetime appointment.

In 2001, this White House agreed to give access to memoranda written by Jeffrey Holmstead, nominated to be an Assistant Administrator of the Environmental Protection Agency. The Senate Committee on Environment and Public Works requested memoranda from Holmstead's years of service in the White House counsel's office under former President Bush. In particular, the committee was interested in materials related to Holmstead's handling of an amendment to the Clean Air Act and other environmental issues. In the summer of 2001, the Bush administration resolved an impasse with the committee over the nomination by permitting committee staffers to review memoranda that Holmstead wrote while in the White House counsel's office. In sum, the administration allowed access to documents from the White House counsel's office—a more sensitive post than the one Mr. Estrada held when he was in the Department of Justice.

In another situation, in 2001, this White House allowed Senator LIEBERMAN and the Senate Government Affairs Committee access to documents regarding environmental rulemaking, although I would note that such access was allowed only after Senator LIEBERMAN threatened to subpoena the information. Faced with this threat, the Bush Administration worked to reach an accommodation, and allowed access to documents, including documents that the administration characterized as ''high-level deliberative documents,'' as part of an oversight investigation of the Bush administration's regulatory rollbacks.

So, despite this administration's continued insistence on confidentiality, it has turned over, allowed access or worked to reach an accommodation on access to documents similar to those requested in connection with the Estrada nomination in other cases and for other committees. And, again, in the instance of the Estrada nomination, the matter before the Senate concerns a lifetime appointment to the second-highest court in the land.

Last Thursday, the former Republican leader accepted ''part of the blame'' for how the Senate has come to consider judicial nominations. I appreciate that because it is one of the few times a Republican Senator has accepted responsibility for what happened during the years in which the Republican majority in the Senate blocked and delayed so many of President Clinton's judicial nominees. The Senator from Mississippi also acknowledged that ''you filibuster a lot of different ways.'' I thank the Senator from Mississippi for trying to be constructive and for suggesting that ''something can be worked out'' on the request for Mr. Estrada's work papers from the Department of Justice.

In yesterday's edition of The Weekly Standard, a report suggests that other Senate Republicans, ''several veteran GOP Senate staffers'' and ''a top GOP leadership aide'' asked the White House to show some flexibility and to share the legal memoranda with the Senate to resolve this matter, but they were rebuffed. It is regrettable that the White House will not listen to reason from Senate Democrats or Senate Republicans. If they had, there would be no need for this cloture vote. The White House is less interested in making progress on the Estrada nomination than in trying to score political points and to divide the Hispanic community.

The real ''double standard'' here is that the President selected Mr. Estrada based in large part on his work for 4½ years in the Solicitor General's Office as well as for his ideological views, but the administration says that the Senate may not examine his written work from the office that would shed the most light on his views. The White House says that the Senate should not consider the very ideology the White House took into account in selecting a 41-year-old for a lifetime seat on the country's second-highest court. Another double standard at work here is that this is a nominee who is well known for having very passionate views about judicial decisions and legal policy and is well known for being outspoken, and yet he has refused to share his views with the very people charged with evaluating his nomination.

It seems to be a perversion of the constitutional process to require the Senate to stumble in the dark about his views, when he shares his views quite freely with others and when this Administration has selected him for the privilege of this high office, and for life, based on those views.

One of the most disconcerting aspects of the manner in which the Senate is approaching these divisive judicial nominations is what appears to be the Republican majority's willingness to sacrifice the constitutional authority of the Senate as a check on the power of the President in the area of lifetime appointments to our federal courts. It should concern all of us and the American people that the Republican majority's efforts to re-write Senate history in order to rubber stamp this White House's Federal judicial nominees will cause long-term damage to this institution, to our courts, to our constitutional form of government, to the rights and protections of the American people and to generations to come.

The White House is using ideology to select its judicial nominees but is trying to prevent the Senate from knowing the ideology of these nominees when it evaluates them. It was not so long ago when then-Senator Ashcroft was chairing a series of Judiciary Committee hearings at which Edwin Meese III testified:

I think that very extensive investigations of each nominee—and I don't worry about the delay that this might cause because, remember, those judges are going to be on the bench for their professional lifetime, so they have got plenty of time ahead once they are confirmed, and there is very little opportunity to pull them out of those benches once they have been confirmed—I think a careful investigation of the background of each judge, including their writings, if they have previously been judges or in public positions, the actions that they have taken, the decisions that they have written, so that we can to the extent possible eliminate people eliminate persons who would turn out to be activist judges from being confirmed.

Timothy E. Flanigan, an official from the administration of the President's father, and who more recently served as Deputy White House Counsel, helping the current President select his judicial nominees, testified strongly in favor of ''the need for the Judiciary Committee and the full Senate to be extraordinarily diligent in examining the judicial philosophy of potential nominees.'' He continued:

In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. In the absence of such evidence, the Senate has often confirmed a nominee on the theory that it could find no fault with the nominee. I would reverse the presumption and place the burden squarely on the shoulders of the judicial nominee to prove that he or she has a well-thought-out judicial philosophy, one that recognizes the limited role for Federal judges. Such a burden is appropriately borne by one seeking life tenure to wield the awesome judicial power of the United States.

Now that the occupant of the White House no longer is a popularly elected Democrat but a Republican, these principles seem no longer to have any support within the White House or the Senate Republican majority. Fortunately, our constitutional principles and our Senate traditions, practices and governing rules do not change with the political party that occupies the White House or with a shift in majority in the Senate.

The White House, in conjunction with the new Republican majority in the Senate, is purposeful in choosing these battles over judicial nominations. Dividing rather than uniting has become their modus operandi. The decision by the Republican Senate majority to focus on controversial nominations says much about their mistaken priorities. The Republican majority sets the agenda and they schedule the debate, just as they have again here today.

I have served in the Senate for 29 years, and until recently I have never seen such stridency on the part of an administration or such willingness on the part of a Senate majority to cast aside tradition and upset the balances embedded in our Constitution, in order to expand presidential power. What I find unprecedented are the excesses that the Republican majority and this White House are willing to indulge to override the constitutional division of power over appointments and long-standing Senate practices and history. It strikes me that some Republicans seem to think that they are writing on a blank slate and that they have been given a blank check to pack the courts.

They show a disturbing penchant for reading the Constitution to suit their purposes of the moment rather than as it has functioned for more than 200 years to protect all Americans through its checks and balances.

The Democratic leader pointed the way out of this impasse again in his letter to the President on February 11. It is regrettable that the President did not respond to that reasonable effort to resolve this matter. Indeed, the letter he sent last week to Senator FRIST was not a response to Senator DASCHLE's reasonable and realistic approach, but a further effort to minimize the Senate's role in this process by proposing radical changes in Senate rules and practices to the great benefit of this administration.

A distinguished senior Republican Senator saw the reasonableness of the suggestions that the Democratic leader and assistant leader have consistently made during this debate when he agreed on February 14 that they pointed the way out of the impasse. Regrettably, his efforts and judgment were also rejected by the administration.

The Supreme Court, in an opinion authored last year by none other than Justice Scalia, one of this President's judicial role models, instructs that judicial ethics do not prevent candidates for judicial office or judicial nominees from sharing their judicial philosophy and views.

With respect to ''precedent,'' Republicans not only joined in the filibuster of the nomination of Abe Fortas to be Chief Justice of the United States Supreme Court, they joined in the filibuster of Stephen Breyer to the First Circuit, Judge Rosemary Barkett to the Eleventh Circuit, Judge H. Lee Sarokin to the Third Circuit, and Judge Richard Paez and Judge Marsha Berzon to the Ninth Circuit. The truth is that filibusters on nominations and legislative matters and extended debate on judicial nominations, including circuit court nominations, have become more and more common through Republicans' own actions.

Of course, when they are in the majority Republicans have more successfully defeated nominees by refusing to proceed on them and have not publicly explained their actions, preferring to act in secret under the cloak of anonymity. From 1995 through 2001, when Republicans previously controlled the Senate majority, Republican efforts to defeat President Clinton's judicial nominees most often took place through inaction and anonymous holds for which no Republican Senator could be held accountable. In effect, these were anonymous filibusters.

Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them, and they eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and committee votes.

Beyond judicial nominees, Republicans also filibustered the nomination of executive branch nominees. They successfully filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nomination to be Surgeon General also required cloture but he was successfully confirmed.

Other executive branch nominees who were filibustered by Republicans include Walter Dellinger's nomination to be Assistant Attorney General, and two cloture motions were required to be filed and both were rejected by Republicans. In this case we were able finally to obtain a confirmation vote after elaborate effort, and Mr. Dellinger was confirmed to that position with 34 votes against him. He was never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him. In addition, in 1993, Republicans objected to a number of State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in cloture motions.

In 1994, Republicans successfully filibustered the nomination of Sam Brown to be an Ambassador. After three cloture motions were filed, his nomination was returned to President Clinton without Senate action. Also in 1994, two cloture petitions were required to get a vote on the nomination of Derek Shearer to be an Ambassador. And it likewise took two cloture motions to get a vote on the nomination of Ricki Tigert to chair the FDIC. So when Republican Senators now talk about the

Senate Executive Calendar and Presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees.

Nonetheless, in spite of all the intransigence of the White House and all of the doublespeak by some of our colleagues on the other side of the aisle, I can report that the Senate has moved forward to confirm 111 of President Bush's judicial nominations since July 2001. That total includes 11 judges confirmed so far this year, and of those, seven were confirmed last week. The Senate last Thursday moved forward on the controversial nomination of Jay S. Bybee to the United States Court of Appeals for the Ninth Circuit.

Those observing these matters might contrast this progress with the start of the last Congress in which the Republican majority in the Senate was delaying consideration of President Clinton's judicial nominees. In 1999, the first hearing on a judicial nominee was not until mid-June. The Senate did not reach 11 confirmations until the end of July of that year. Accordingly, the facts show that Democratic Senators are being extraordinarily cooperative with a Senate majority and a White House that refuses to cooperate with us. We have made progress in spite of that lack of comity and cooperation.

We worked hard to reduce Federal judicial vacancies to under 55, which includes the 20 judgeships the Democratic-led Senate authorized in the 21st Century Department of Justice Appropriations Authorization Act last year. That is an extremely low vacancy number based on recent history and well below the 67 vacancies that Senator HATCH termed ''full employment'' on the Federal bench during the Clinton Administration.

It is unfortunate that the White House and some Republicans have insisted on this confrontation rather than working with us to provide the needed information so that we could proceed to an up-or-down vote. Some on the Republican side seem to prefer political game playing, seeking to pack our courts with ideologues and leveling baseless charges of bigotry, rather than to work with us to resolve the impasse over this nomination by providing information and proceeding to a fair vote.

I was disappointed that Senator BENNETT's straightforward colloquy with Senator REID and me on February 14, which pointed to a solution, was never allowed by hard-liners on the other side to yield results. I am disappointed that all my efforts and those of Senator DASCHLE and Senator REID have been rejected by the White House. The letter that Senator DASCHLE sent to the President on February 11 pointed the way to resolving this matter reasonably and fairly. Republicans would apparently rather engage in politics.

I urge the White House and Senate Republicans to end the political warfare and join with us in good faith to make sure the information that is needed to review this nomination is provided so that the Senate may conclude its consideration of this nomination. I urge the White House, as I have for more than 2 years, to work with us and, quoting from a recent column by Thomas Mann of The Brookings Institute, to submit ''a more balanced ticket of judicial nominees and engag[e] in genuine negotiations and compromise with both parties in Congress.''

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation and, in this case, he has even managed to divide Hispanics across the country. The nomination and confirmation process begins with the President, and I urge him to work with us to find a way forward to unite the Nation on these issues, instead of to divide the Nation.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 21, the nomination of Miguel A. Estrada to be United States Circuit Judge for the District of Columbia Circuit:

Bill Frist, Orrin Hatch, Robert F. Bennett, James Inhofe, John Ensign, Sam Brownback, Michael B. Enzi, Wayne Allard, Mike Crapo, Susan Collins, Pete Domenici, Conrad Burns, Kay Bailey Hutchison, John E. Sununu, Norm Coleman, Charles Grassley.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call under the rule is waived.

The question is, Is it the sense of the Senate that debate on the nomination of Miguel A. Estrada, of Virginia, to be the United States Circuit Judge for the District of Columbia Circuit shall be brought to a close? The yeas and nays are required under the rule.

The clerk will call the roll.

The senior assistant bill clerk called the roll.

The PRESIDING OFFICER (Mr. ENSIGN). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 55, nays 45, as follows:

[Rollcall Vote No. 56 Ex.]

YEAS—55

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (FL)
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Chafee	Hatch	Specter
Chambliss	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Voinovich
Craig	McCain	Warner
Crapo	McConnell	
DeWine	Miller	

NAYS—45

Akaka	Dorgan	Lautenberg
Baucus	Durbin	Leahy
Bayh	Edwards	Levin
Biden	Feingold	Lieberman
Bingaman	Feinstein	Lincoln
Boxer	Graham (FL)	Mikulski
Byrd	Harkin	Murray
Cantwell	Hollings	Pryor
Carper	Inouye	Reed
Clinton	Jeffords	Reid
Conrad	Johnson	Rockefeller
Corzine	Kennedy	Sarbanes
Daschle	Kerry	Schumer
Dayton	Kohl	Stabenow
Dodd	Landrieu	Wyden

The PRESIDING OFFICER. On this vote, the yeas are 55, the nays are 45. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. REID. Mr. President, I move to reconsider the vote.

Mr. NICKLES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

LEGISLATIVE SESSION

CONGRESSIONAL BUDGET FOR THE U.S. GOVERNMENT FOR FISCAL YEAR 2004—Continued

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session and resume consideration of S. Con. Res. 23.

The Senator from Oklahoma.

Mr. NICKLES. How much time remains on the Conrad amendment?

The PRESIDING OFFICER. The majority has 51 minutes and the minority has 19 minutes.

Mr. NICKLES. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. NICKLES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. COLEMAN). Without objection, it is so ordered.

Mr. NICKLES. Mr. President, we are now on the Conrad amendment. The majority leader wishes to speak. I ask unanimous consent the time for that statement be charged against the majority side on the budget resolution. Following the statement, the Senate will recess. That recess will be charged to the amendment. When the amendment time runs out, it will be charged to the majority side on the budget resolution.

Mr. REID. Reserving the right to object, it is my understanding Senator CONRAD has 19 minutes remaining on the amendment.

The PRESIDING OFFICER. Correct.

Mr. CONRAD. Reserving the right to object, I want to understand just what transpired before we go forward.

Mr. REID. If I could state what is going to happen, after the majority leader makes his statement, we will go into a quorum call and the time will be